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May 28, 2004

Joseph DuBray, Jr
Director, Division of Policy,
Planning and Program Development
Office of Federal Contract Compliance
Programs
Room C-3325
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Obligation to Solicit Race and Gender Data for
Agency Enforcement Purposes
69 *Federal Register* 16446, March 29, 2004

Dear Mr. DuBray:

The American Bankers Association ("ABA") is responding to the request for comments by the Office of Federal Contract Compliance Programs ("OFCCP") on the above proposal. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country. Many of our member institutions are federal contractors and, therefore, are subject to these regulations.

At the outset, ABA applauds the OFCCP for this proposal. We believe the inclusion of "minimum qualifications" criteria and the adjusted recordkeeping requirements for Internet Applicants are significant steps toward addressing the burden on federal contractors resulting from OFCCP's regulations.

Background

OFCCP's proposal was issued in conjunction with the recent joint proposal adopting additional questions and answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") as they relate to the Internet and related technologies. The Uniform Guidelines provide that each of the participating agencies may provide further information, as appropriate, through the issuance of additional guidance or regulations designed to enable each agency to carry out its specific enforcement requirements. OFCCP's proposal would amend its recordkeeping requirements for compliance and enforcement purposes.

Discussion

In addition to the proposed questions and answers under the Uniform Guidelines, OFCCP's proposal would § 60-1.3 to add a definition of "Internet Applicant." Under the proposal, an Internet Applicant would be defined as:

- A job seeker who has submitted an expression of interest in employment through the Internet or related electronic technologies;
- The employer considers the job seeker for employment in a particular open position;
- The job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and
- The job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.

The "advertised, basic qualifications" are the qualifications that the employer Advertises to potential applicants that they must possess in order to be considered for the position. The proposed definition further provides that "advertised, basic qualifications" must be noncomparative features of a job seeker, meaning that the employer cannot compare the relative qualifications of job seekers to determine which candidates have the best qualifications. The qualifications must also be job related and not dependant on the employer's subject judgment.

The proposal further requires that federal contractors must keep records for two years of all applicants, whether or not they applied through the Internet. This requirement includes not only applicants that meet the four criteria for Internet Applicants, but all those that do *not* meet those criteria. This recordkeeping is intended to provide a mechanism for OFCCP to make sure that the new criteria are being applied consistently. However, the proposal would require that race and gender information be collected, where possible, only on Internet Applicants who satisfy the four criteria, not on all Internet Applicants.

OFCCP's proposal departs from Uniform Guidelines in that the collection requirements for race and gender information will apply to only those Internet Applicants that are "minimally qualified" for the job. Although employers have always used such criteria, they currently have to try to obtain race and gender information on the thousands of "expressions of interest" that reach them through various electronic means as well as by other methods. We believe the proposal will reduce the recordkeeping burden on federal contractors to a more reasonable level. Accordingly, ABA strongly supports the proposal.

Finally, we want to reiterate that we are adamantly opposed to the limitation under the Uniform Guidelines and, necessarily, this proposal that this guidance applies only to individuals who apply through electronic means. As a result of this irrational bifurcation, employers will face the enormous burden of creating two parallel tracking systems. The current system would have to be maintained applications received in paper form using the current definition of applicant in the Uniform Guidelines. An entirely new system would have to be created for applications received via electronic data processing technologies.

Given the clear and prolonged need for guidance on the definition of applicant, ABA sees no reason not to apply both the Uniform Guidelines proposal and this OFCCP proposal all applications, no matter what format they are received in. There is simply no justification for requiring employers to create an entirely new and redundant tracking system, when the need for guidance with respect to all forms of applications has become so critical.

Conclusion

In conclusion, ABA strongly supports OFCCP's proposal and encourages the agency to work toward a definition of applicant that includes "minimum qualifications" with respect to *all* applications, regardless of the manner in which they are received.

If you have any questions about these comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "Cristeena G. Naser". The signature is fluid and cursive, with the first name being the most prominent.

Cristeena G. Naser